



# THE EMPLOYMENT TRIBUNALS

**BETWEEN**

**Mr David Adam Silva**

*Claimant*

and

**Simya Canteen Limited**

*Respondent*

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Region: London Central**

**ON: 2 December 2021**

**Before: Employment Judge Paul Stewart**

### ***Appearances:***

**For Claimant: In person**

**For Respondent: did not appear and was not represented**

## **JUDGMENT**

The Respondent is to pay to the Claimant the sum of £3,304.58 representing the net sum to which he is entitled for

- (1) Damages for breach of contract; and
- (2) Holiday pay.

## **REASONS**

1. The Respondent did not choose to appear at this hearing. I am satisfied they had notice of the hearing because they were engaged in the process having sought, and obtained on 14 May 2021, a reconsideration of the judgment of 20 October 2020 that had been made by Regional Employment Judge Wade who had, at the time, believed that the Respondent had not presented a response to the Claimant's claim and thus had fallen foul of Rule 16. Time for filing an ET3 was extended. The Respondent has availed itself of this extension and an ET3 has been filed. Given that the Respondent had been so engaged, there is every reason to assume that notification of this hearing was sent out to the parties. The ET3 stated that the Respondent was being represented by Peninsula UK. It may be that that organisation has parted company with the Respondent but, if that is the case, proper discharge of its responsibilities to its client would have ensured the Respondent was apprised of the date of this Hearing and of any directions that needed to be attended to.

## Facts

2. The Claimant is of Brazilian nationality. The significance of his nationality is that he was not that familiar with UK employment practices when he was employed by the Respondent from 30 September 2019 through to 12 August 2020 as a supervisor in the restaurant it operated in the London Borough of Hammersmith & Fulham.
3. I have seen an undated letter which offered the Claimant this employment. Mr Jucemar Cardoso Junior – whom the Claimant knew as “JJ” - signed the letter on behalf of the Respondent. The salary – referred to in the letter as the “payrate” – is stated to be £24,000.
4. I have also seen a document which purports to be a contract of employment between the Respondent and the Claimant. The document is dated 25 September 2019 and bears signatures at the foot of the letter of Mr Shuoyun Zhou, a director of the Respondent, and of the Claimant.
5. The contract of employment is significantly different from the contract. The remuneration which is promised under the contract is £1,500 gross plus £350 cash per month. The mention of some part of the remuneration being a payment in cash raises alarm bells as to whether the parties had entered into an illegal contract. However, I am satisfied that whatever the motivation of the Respondent might have been in framing the remuneration in such fashion, the Claimant signed the contract having been given assurances that the contract was, in fact, promising the same money as the offer of employment.
6. I have seen photos that were made of the text conversation which the Claimant had with a representative of the Respondent known as Phil on 11 November 2019 in which the Claimant stated that he had been expecting to receive the annual salary of £24,000 which JJ had offered at the beginning of the employment relationship. The Claimant continued:

*And then I saw that on the contract on the day of the agreement Salary £1500 gross plus £350 cash payment. I've got confused. And JJ said that it was there to avoid tax only that's why a agreed.*

*So my question is Am I getting the gross £24000 annual?*

7. Phil asked for time to check and then came back with a statement that read as follows:

Gross Salary	£ 2,000.00
Tax Free Allowance	£ 1,041.67
Total Taxable	£ 958.33
Income Tax	£ 191.67
National Insurance	£ 153.68
National Insurance (Employer)	£ 176.73
Total Deductions	£ 345.35
Net Wage	£ 1,654.65

8. Phil went on:

*Look  
this is our accountant send me  
2000 gross is 1654 net  
would you like to pay the tax?  
all these you can check on the internet  
there is calculator which can help you to see how much tax you have to pay  
1500 (gross) + 350 means if you don't want to pay that much tax  
we can pay the tax depends on 1500 gross and 350 cash*

9. Phil then set out the annual deduction table for a salary of £24,000:

Gross Salary	£ 24,000.00
Tax Free Allowance	£ 12,500.00
Total Taxable	£ 11,500.00
Income Tax	£ 2,300.00
National Insurance	£ 1,844.16
National Insurance (Employer)	£ 2,120.78
Total Deductions	£ 4,144.16
Net Wage	£ 19,855.84

10. He followed this with a shorter table showing the calculation of a gross of £18,000:

Gross Salary	£ 18,000.00
Tax Free Allowance	£ 12,500.00
Total Taxable	£ 5,500.00
Income Tax	£ 1,100.00
National Insurance	£ 1,124.16

11. And then said:

*that will be  $15775/12 + 350 = 1664$  monthly  
but paid less tax  
which you prefer the most  
but all these are the same 24K gross yearly*

12. The conversation continued (with Phil denoted as P and the Claimant as C.)

C. *So I see. Okay I would like to pay the taxes for £24,000 gross and also would like to receive my payslips*

P. *any questions?*

C. *Is that okay?*

P. *ofc*

C. *All right I think that is clear for me now.*

P. *I totally understand how hard you are working now  
Basically I am considering to increase your salary  
when we're doing good for a while*

C. *I really appreciate your consideration Phil. I want to be*

13. And at that point the photographed pages of the November conversation stop. Photos of later exchanges show that, on 15 February 2020, the Claimant sent Phil his National Insurance Number so that the Respondent could give him his past payslips, a request with which Phil said: "we will". On 13 March 2020, the Claimant reported to Phil that JJ had not been able to provide "answers" to the Claimant's request for his payslips. Although Phil indicated that he would speak to the Respondent's accountant the following Monday, the Claimant by Tuesday 23 June had still not received his payslips which he wanted so that, as he put it, he "can well understand and take a look with HMRC what's going on."
14. The Claimant was put on furlough from 20 March 2020 through to June 2020 in which month he worked 5 ½ hours. In July, he resumed working his full-time hours. However, his pay for July was calculated as though he was still on furlough.
15. At the beginning of July, Phil sent through the payslips from October 2019 to June 2020 for which the Claimant thanked him but pointed out that he had not received his P60. Through July, there was extensive correspondence by WhatsApp between the Claimant and Phil in which it is clear that the Claimant felt he had been fooled by the Respondent with regard to his wages which he did not believe corresponded with the correct net amount for the agreed £2,000 per month gross and 80% of that amount for the period when the Claimant was placed on furlough.
16. The Respondent decided in July that it needed to reduce its costs with the result that the Claimant was made redundant as from 12 August 2020. No issues arising from that dismissal concern this Tribunal as, of course, the Claimant was employed for only 10 ½ months. However, the Claimant did not receive a P45.
17. The following table was provided by the Claimant to show the money he received into his bank account as against the figures shown on his payslips:

David's Wages						
	Correct Monthly payment	Payslip Gross pay	Deductions	Payslip Net Pay	Paid in B/acc	Difference to be paid
Oct-19	£2,000	£ 1,500.00	£ 185.12	£ 1,314.88	£ 1,634.00	£180.88
Nov-19	£2,000	£ 1,500.00	£ 185.12	£ 1,314.88	£ 1,655.00	£159.88
Dec-19	£2,000	£ 2,000.00	£ 30.44	£ 1,969.56	£ 1,655.00	£314.56
Jan-20	£2,000	£ 2,000.00	£ 213.24	£ 1,786.76	£ 1,655.00	£131.76
Feb-20	£2,000	£ 1,000.00	£ 53.24	£ 946.76	£ 1,655.00	£291.76
Mar-20	£2,000	£ 2,000.00	£ 213.24	£ 1,786.76	£ 1,215.00	£571.76
Furlough						
	80%					
Apr-20	£1,600	£ 1,148.80	£ 89.38	£ 1,059.42	£ 1,059.42	£451.20
May-20	£1,600	£ 1,148.80	£ 89.18	£ 1,059.62	£ 1,059.62	£451.20
Jun-20	£1,600	£ 1,148.80	£ 89.18	£ 1,059.62	£ 1,059.62	£451.20
worked full hours						
Jul-20	£ 2,000.00	£ 1,314.54	£ 148.89	£ 1,165.65	£ 1,655.00	£196.11
Aug-20	£ 1,384.62				£ -	£1,384.62
Hours not paid						
June	5.5	£ 56.41				£ 56.41
August	27	£ 276.92				£ 276.92
						<b>£4,918.26</b>

Holiday  
15 days  
£2000/195\*9\*15  
(not sure this is the calculation)

Did not receive neither holiday nor payslips and P45 in august

18. This table, which the Claimant informed me was produced by his wife, seeks to set out the amount which the Claimant considers he is owed. That sum appears in the column with the heading "Difference to be paid". This column is a little perplexing at first but, upon investigation, it appears that it is the result of two calculations, the first being to establish the difference between the sums which appears in the column headed by "Correct Monthly Payment" and in the column headed by "Paid into B/acc". For the row devoted to "Oct 19", that difference is £366. The second calculation involves subtracting from that sum the amount that appears under the heading "Deductions". For Oct 19, the sum remaining after that second calculation is £180.88.
19. That calculation ignores the fact that, were the Claimant to have been paid the correct (and greater) monthly gross figure for any particular month, the amount of tax and national insurance that fell to be deducted would necessarily have been greater. Making use of the online calculator that is to be accessed at <https://www.icalculator.info/tax-calculator/2019.html> - and after checking that the results produced by that calculator conformed with the results produced by a manual calculation of net pay from a stated gross pay – I was able to establish the net pay that, in the tax year 2019-20, results from varying monthly gross incomes.

	Corrected Gross Pay £	income tax £	Employee Nat Ins £	Total Deductions £	Corrected Net Pay "A"	Paid into C's B/Acc "B"	Difference between "A" and "B"
Oct-19	2000.00	191.67	153.68	345.35	1654.65	1634.00	(20.65)
Nov-19	2000.00	191.67	153.68	345.35	1654.65	1655.00	0.35
Dec-19	2000.00	191.67	153.68	345.35	1654.65	1655.00	0.35
Jan-20	2000.00	191.67	153.68	345.35	1654.65	1655.00	0.35
Feb-20	2000.00	191.67	153.68	345.35	1654.65	1655.00	0.35
Mar-20	2000.00	191.67	153.68	345.35	1654.65	1215.00	(439.65)
Apr-20	1600.00	111.67	105.68	217.35	1382.65	1059.42	(323.23)
May-20	1600.00	111.67	105.68	217.35	1382.65	1059.42	(323.23)
Jun-20	1600.00	111.67	105.68	217.35	1382.65	1059.42	(323.23)
Jul-20	2000.00	191.67	153.68	345.35	1654.65	1655.00	0.35
Aug-20	2326.01	256.87	192.80	449.67	1876.34	0.00	(1,876.34)
							(3,304.58)

20. The Claimant informed me that the number of hours he worked during August was 27. He was dismissed without the two weeks' notice he should have had. As his normal weekly working hours were 50, that indicates he should have received pay for 127 hours in August. The hourly rate for an employee working 50 hours per week and being paid £24,000 per year is £9.23. Thus, 127 hours at £9.23 per hour = £1,172.21.
21. The Claimant was also entitled to 15 days' holiday pay which he had not received. I calculate that gross pay for 15 days comes to £1,153.80. Thus, his gross pay for

August to include notice and holiday pay should have been £2,326.01. After deductions, that should have been £1,876.34.

22. The total amount of net wages that the Claimant should have received – but did not – was thus £3,304.58. That is the award I make.
23. I should say - for the benefit of the Claimant – that the figures mentioned in these written reasons may differ slightly from those I quoted on 2 December 2021. The reason for that is that I have had a little more time than I had that morning to ensure that I am comfortable with the calculations on which the judgment is based.

**30 December 2021**

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**Employment Judge Paul Stewart**

**DECISION SENT TO THE PARTIES ON**

**30/12/2021**

**AND ENTERED IN THE REGISTER**

**31/12/2021**

**FOR SECRETARY OF THE TRIBUNALS**